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BRIEF FOR PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 791

IRENEE DU PONT, *Petitioner*

vs.

COMMISSIONER OF INTERNAL REVENUE.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The findings of fact and the opinion of the Board of Tax Appeals (R. 12-15) are reported in 20 B. T. A. 482. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 21-27) is reported in 63 Fed. (2d) 44.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 6, 1933. (R. 27.) Petition for a writ of certiorari was filed March 20, 1933, and the writ was granted March 27, 1933. (R. 28.) Jurisdiction is conferred on this Court by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether section 219(h) of the Revenue Acts of 1924 and 1926 is unconstitutional as applied to a case where the grantor created an irrevocable trust for the payment of premiums on policies of insurance upon his life and parted with all rights and benefits under such trust and under the insurance policies prior to the enactment of said section of the Revenue Acts.

STATUTE INVOLVED

Part of section 219(h) of the Revenue Acts of 1924 and 1926:

> "* * * Where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor * * * such part of the income of the trust shall be included in computing the net income of the grantor."[1]

STATEMENT

The facts as found by the Board of Tax Appeals (R. 12-14) are as follows:

"The petitioner, under date of September 18, 1923, executed nine trust agreements for the benefit of his

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[1] Section 219(h) and other pertinent parts of section 219 are shown in full in the Appendix, pp. 22 and 23.

wife, their nine children, and other members and relatives of his family. These trusts were irrevocable for their duration, which was in the first instance until December 18, 1926, with provision for further extension upon notice by the trustor to the trustee. Two such notices have been given and the trusts have been extended to December 18, 1932.

"By the trust agreements, the petitioner transferred to the Wilmington Trust Company, as trustee, the following properties:

"(a) Thirty-two insurance policies on the petitioner's life.

"(b) Eight hundred and thirty shares of 7 per cent preferred stock of the Christiana Securities Company, a corporation existing under the laws of the State of Delaware.

"The nine trust agreements were in full force and effect during the years 1924-1926, inclusive, and the 32 insurance policies were likewise in full force and effect and held under the terms of the trust during those years.

"The transfer of the insurance policies was absolute and complete. By the trust instruments the trustee was made the owner of such policies and, if the trusts terminated prior to the petitioner's death, all interest in the policies would vest in certain named beneficiaries. The petitioner is not one of such beneficiaries. If the petitioner dies prior to December 8, 1932 (or such other date to which the trusts might further be extended), the proceeds of the life insurance policies are to become a trust fund in the hands of the trustee, designated as the Primary Trust Fund. The net income therefrom and the fund itself would be distributed and paid over to named beneficiaries, other than the petitioner or his estate, as indicated in the trust agreements.

"The petitioner retains no right to change the beneficiaries under the insurance policies named in the trust agreements. He has no right to surrender the policies for the surrender values indicated therein, nor to borrow against them. There is no provision under which title to the policies could revest in the taxpayer either at his own discretion or that of him co-jointly with anybody else.

"As to the shares of stock transferred under the trust agreements, the trustee receives the income from the securities, applies the same to the payment of taxes, governmental charges, and incidental expenses including its commissions, and uses the balance of the income for the payment of premiums on the policies of life insurance for the period of the trusts, or so long as the petitioner lives, whichever is the shorter.

"If the trusts terminate prior to the petitioner's death, the securities and any income not paid out, all of which is designated the Secondary Trust Fund, are to be transferred to the petitioner. If the petitioner dies prior to the end of the trusts, the securities and any net income thereon are to be distributed to the nine children or their issue in the manner specified therein. No part of the Secondary Trust Fund in such case, goes to the petitioner's estate.

"Such is the combined substantive effect of the provisions of the nine trust agreements. To simplify the description of the separate interest of each child dependent upon contingencies, nine distinct trusts (each applying to a one-ninth share in the trust funds) are provided for.

"During the year 1924 dividends from securities transferred to and held by the Wilmington Trust Company as trustee, amounting to $50,422.40, were received by such trustee and, pursuant to the terms of the trusts, were used to pay insurance premiums. During the

year 1925 dividends amounting to $50,370.10 and during the year 1926 dividends amounting to $50,422.40 were so received and applied. These amounts have been treated by the Bureau as income taxable to the petitioner and subject to income taxes and surtaxes under the Revenue Acts of 1924 and 1926. This action is based upon the Commissioner's interpretation of Section 219(h) of the Revenue Acts of 1924 and 1926.

"The petitioner's wife and all the children, beneficiaries of the trust, were living during the years 1924 and 1926, and are still living."

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In failing to hold the petitioner was not taxable on the dividends received and applied by the trustee to pay insurance premiums pursuant to the terms of the trusts.
2. In failing to hold section 219(h) of the Revenue Acts of 1924 and 1926 unconstitutional as applied to the facts of this case.
3. In failing to reverse the decision of the United States Board of Tax Appeals which decided the case against the petitioner and to remand the case to such Board of Tax Appeals with instructions to enter a decision finding no deficiency in petitioner's income taxes for the calendar years 1924, 1925 and 1926.

SUMMARY OF ARGUMENT

Prior to the first enactment of section 219(h) of the Revenue Acts of 1924 and 1926 the petitioner created trusts irrevocable for their terms, the income to pay premiums upon insurance policies on his life, such policies being in no part the property of the petitioner.

The petitioner, having waived the right to change the beneficiary and transferred his ownership of the insurance policies to the trustee, was in no sense the beneficiary of the trusts. And he had reserved no right to revoke or alter the trusts.

Even if his motive were the reduction of his income taxes, that would not invalidate an otherwise legitimate transaction.

The Government proposes to include in the petitioner's income for 1924, 1925 and 1926 the dividends received by the trustee and applied to the payment of premiums on the insurance policies.

Since petitioner throughout the taxable years involved had no interest in the corpus or income of the trusts and no interest in the life insurance policies, the collection of a tax under section 219(h) of the Revenue Acts of 1924 and 1926 would be unconstitutional, for it would be taxing the petitioner upon income which (a) did not belong to him, (b) was not received by him nor held for future distribution to him, (c) was not derived from his efforts, (d) was not derived from a corpus in which he had any rights, (e) was not subject to his control and was not derived from a corpus subject to his control, (f) did not benefit him in any way, and (g) could not be used by him in payment of the tax asserted with respect to it.

The fact that the petitioner had a reversion in the corpus does not render him taxable on the income during the prior term because the trustee was for the term of the trusts the owner of both corpus and income for uses other than those of the petitioner.

The extension of the trusts from December 18, 1926, was similar to the creation of new trusts, and being for their terms absolute and irrevocable, rendered the corpus and income the property of the trustee, and not

taxable to the petitioner for the reasons mentioned above.

Accordingly, the Court should hold section 219(h) of the Revenue Acts of 1924 and 1926 unconstitutional as applied to the facts of this case.

ARGUMENT

POINT I

Introductory

In 1923 before the enactment of the Revenue Act of 1924 or the Revenue Act of 1926 and before the enactment of any statute containing any provision in any manner resembling subdivision (h) of Section 219 of the Revenue Acts of 1924 and 1926,[1] the petitioner made nine irrevocable deeds of trust by which he conveyed certain property to a trustee. Under the terms of the trusts the trustee was authorized or directed to use the income from the corpus to pay premiums upon insurance policies on the life of the grantor, and the expenses of operating the trust. Income not so used was to be accumulated and to be either transferred to the petitioner at the termination of the trust or in the event of his death prior to the termination of the trust then the unused and accumulated income was to be paid to the beneficiaries of the trust. The petitioner was in no sense a beneficiary of the trusts or of the life insurance policies (for he specifically waived the right to change the beneficiary named in the policies—i. e., the trustee). (R. 12-13.) The petitioner reserved no

[1] And accordingly not within the doctrine of *Milliken* v. *United States*, 283 U. S. 15, 51 S. Ct. 324, and *Klein* v. *United States*, 283 U. S. 231, 51 S. Ct. 398; but rather within that of *Nichols* v. *Coolidge*, 274 U. S. 531, 47 S. Ct. 710, and *Coolidge* v. *Long*, 282 U. S. 582, 51 S. Ct. 306.

right to revoke the trusts or to alter their terms. The conveyance of the corpus of the trusts was absolute for the duration of the trusts. And the ownership of the insurance policies was absolute in the trustee. (R. 13.)

It seems possible that the motive for the creation of these trusts was the reduction of the petitioner's income taxes. But such a motive does not in any manner invalidate an otherwise legitimate transaction and does not constitute tax evasion.[1]

Had the Revenue Act in force at the time the trusts were created carried a provision similar to section 219(h) of the Revenue Acts of 1924 and 1926, it is a fair assumption that the trusts would not have been created.

After the trusts had been in force for some time, the Revenue Act of 1924 was enacted, including in section 219 the following paragraph:

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[1] *United States* v. *Isham*, 17 Wall. 496, *Cf. Clapp* v. *Heiner*, 51 Fed. (2d) 224, 225 (C. C. A. 3rd), where the court said:

> "The contest between the cititzen and his government over taxes will beyond question last as long as that other great struggle with which it is often coupled. To describe its various phases as evasion rather than as avoidance seems to us to use the language of the ultimately victorious contestant rather than to speak as an impartial observer. The artifice or cunning implicit in the first term is not consistent with the approval given by the courts to a disposition of property in the manner best suited to avoid taxation."

and continued with a quotation of the oft cited language of Mr. Justice Holmes in *Bullen* v. *Wisconsin*, 240 U. S. 625, 630.

Compare the remarks of Senator David A. Reed in debating the Revenue Act of 1932 (Cong. Rec., v. 75, p. 11765):

> "It is just like a citizen who comes to a river. He finds two bridges, one a free public bridge and the other a toll bridge. He goes over the free bridge. It can not be said that he is evading the toll. He is taking the method which is not taxable, and he is not resorting to the method that is taxable. Nobody can fairly charge him with evading the tax."

"(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or *where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor* (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), *such part of the income of the trust shall be included in computing the net income of the grantor.*"

The Revenue Act of 1926 carried the same provision under a similar section number.

In determining income taxes for 1924, 1925 and 1926, the respondent included in petitioner's taxable income the dividends received by the trustee upon the securities which constituted the corpus of the trusts, upon the ground that they fell within the phraseology emphasized in the foregoing quotation. (R. 5-7.) The Board of Tax Appeals upheld the respondent on the same ground (R. 14-15) and the Circuit Court of Appeals affirmed the Board's decision.

POINT II.

Petitioner, at the Time of the Enactment of the Revenue Act of 1924, and Throughout the Taxable Years Involved,[1] Had No Interest in the Corpus or Income of the Trusts.

The deeds of trust were in evidence before the Board of Tax Appeals and their provisions are summarized

[1] Except possibly for the period from December 18 to December 31, 1926.

in the Board's findings of fact. (R. 12-13.) The summaries indicate no reservation of any power to revoke or alter. The Board, in its findings of fact (R. 12) recognizes that they were irrevocable, saying:

> "These trusts were irrevocable for their duration, which was in the first instance until December 18, 1926, with provision for further extension upon notice by the trustor to the trustee. Two such notices have been given and the trusts have been extended to December 18, 1932."

The corpus was the property of the trustee, the income was the property of the trustee, in trust entirely for the benefit of persons other than the petitioner. The petitioner had no power during the period of the trusts to revest in himself any right to any part of corpus or income and he had no measure of control over either.

As Mr. Justice Butler said in *Coolidge* v. *Long*, 282 U. S. 582, 602:

> "The overwhelming weight of authority sustains the conclusion that the succession in the present case was complete when the deed took effect."

The Circuit Court of Appeals in its opinion likewise recognized that the trusts "were irrevocable for their term of duration" and that thereunder the petitioner "transferred * * * certain shares of stock to the trustee" (R. 21) and that "he has postponed his command over funds and policies for three years. While he has neither power over, nor title to, the funds nor a direct financial interest in the insurance policies, yet * * *." (R. 25.)

POINT III.

Petitioner, at the Time of the Enactment of the Revenue Act of 1924, and Throughout the Taxable Years Involved, Had No Interest in the Life Insurance Policies.

It should be noted that although the transfer of the stocks, the income of which was to be used by the trustee for paying premiums, was for a period of three years, subject to extensions, the transfer of the insurance policies was not temporary but permanent and absolute.

The Board of Tax Appeals found as facts that:

> "The transfer of the insurance policies was absolute and complete. By the trust instruments the trustee was made the owner of such policies and, if the trusts terminated prior to the petitioner's death, all interest in the policies would vest in certain named beneficiaries. The petitioner is not one of such beneficiaries. * * * The petitioner retains no right to change the beneficiaries under the insurance policies named in the trust agreements. He has no right to surrender the policies for the surrender values indicated therein, nor to borrow against them. There is no provision under which title to the policies could revest in the taxpayer either at his own discretion or that of him cojointly with anybody else." (R. 12-13.)

The Circuit Court of Appeals recognized that the petitioner "transferred thirty-two policies insuring his life * * * to the trustee. (R. 21.) * * * If the trusts terminate before the death of the petitioner, all interest in the insurance policies will vest in certain beneficiaries of whom the petitioner is not one * * *. If the petitioner dies before the trusts terminate, the proceeds of the insurance policies will become a trust fund to be distributed under the terms of the agreement, and the stock likewise distributed to beneficiaries, other than

the petitioner's estate named in the agreement." (R. 22.)

Where the Court later in its opinion (R. 25) says, "He has postponed his command over funds and policies for three years" and "he has merely postponed his right for the term of the trusts * * * to terminate the existence of the contracts of insurance," it is confusing the temporary trust of the stocks with the permanent transfer of the insurance policies and is departing from the facts as found by the Board and recognized in the early part of its opinion.

POINT IV.

The Collection of a Tax Under Section 219(h) of the Revenue Acts of 1924 and 1926 from the Petitioner Herein Would Be Unconstitutional.

The Commissioner of Internal Revenue is seeking to assess against the petitioner a tax upon certain income although it appears that:

(a) The income did not belong to the petitioner.

(b) The income was not received by the petitioner, nor could it be held for future distribution to him.

(c) The income was not derived from the petitioner's efforts.

(d) The income was not derived from a corpus in which the petitioner had any rights during the taxable years.[1]

(e) The petitioner had reserved no right, either alone or in conjunction with any one else, to revoke or in any way to modify the terms of the trusts.

(f) The petitioner derived no benefit from the income.

(g) The petitioner could not cause any part of the income to be paid to the Collector for the tax.

Accordingly, it is submitted that:

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[1] Except perhaps from December 18 to December 31, 1926.

(a) the case is controlled by *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, where the opinion by Mr. Justice Roberts says (p. 215):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare Nichols v. Coolidge, 274 U. S. 531, 540, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A. L. R. 1081."

That the Fifth Amendment restricts Congress in the same manner that the Fourteenth Amendment restricts the state legislatures is settled in *Heiner* v. *Donnan*, 285 U. S. 312.

In *Knowlton* v. *Moore*, 178 U. S. 41, which involved the interpretation of the War Revenue Act of 1898, where taxes had been collected on certain legacies and distributive shares, the rate being fixed, not on the amount coming to each individual, but on the whole personal estate, this Court condemned such method in these words:

> "But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is worth only $1,000, may be taxed, but that the rate of tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated."

With the same thought in mind, in *Hartman* v. *Greenhow*, 106 U. S. 642, which involved the validity

of a statute requiring a tax on bonds to be deducted from coupons, which were detached and held by different owners, this Court said:

> "Surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another."

(b) This case is dissimilar to such cases as *Taft* v. *Bowers*, 278 U. S. 470, *Cooper* v. *United States*, 280 U. S. 409, *United States* v. *Phellis*, 257 U. S. 156, etc., for in each of those cases the taxed income was actually received by the person to whom it was taxed, for his own use.

(c) This case is dissimilar to *Lucas* v. *Earl*, 281 U. S. 111, for there the taxed income was Mr. Earl's salary. He was the tree from which the fruit was derived. The court held it proper to tax the salary to him. In our case, the tree was certain corporate stocks over which the petitioner certainly had no control between January 1, 1924, and December 18, 1926.

(d) This case is dissimilar to such cases as *Cohan* v. *Commissioner*, 39 Fed. (2d) 540, *Bing* v. *Bowers*, 26 Fed. (2d) 1017, etc., for in those cases the tax was upheld on the ground that the taxpayers were the owners and in control of the corpus from which the income was derived.

(e) The present case is entirely different from *Reinecke* v. *Smith*—U. S.— (decided by this Court on April 10, 1933.) The *ratio decidendi* in that case was that as a practical matter the settlor of the trust had retained a measure of control in his power to revoke, such power needing only the association of a trustee who had no adverse interest. As Mr. Justice Roberts wrote:

"A settlor who at every moment retains the power to repossess the corpus and enjoy the income has such a measure of control as justifies the imposition of the tax upon him."

In the case at bar, the settlor retained no power to repossess the corpus until December 18, 1926. From the creation of the trust until that date he could avail himself of neither the corpus nor the income for any purpose.

Corliss v. *Bowers*, 281 U. S. 376, and *Porter* v. *Commissioner*—U. S.—(Mar. 13, 1933) are similarly distinguishable.

(f) In such cases as *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, *United States v. Boston & Maine Railroad*, 279 U. S. 732, and *United States* v. *Mahoning Coal Railroad Co.*, 51 Fed. (2d) 208, taxes paid by employers and lessees for account of employees and lessors were treated as additional income to the latter because the payments were made as part of the consideration for services rendered or for the use of property. The courts held that it was reasonable to tax the income to the one who produced it by his efforts or to the one whose property yielded it.

Similarly, in *Adams* v.*Commissioner*, 18 B. T. A. 381, and *Danforth* v. *Commissioner*, 18 B. T. A. 1221, premiums were paid as part of compensation for services and were held taxable to the one who rendered the services so compensated.

In all of these cases the person taxed was either the tree or the owner of the tree, from which the fruit was derived. In the case at bar the fruit was yielded by a tree over which the petitioner had no control, and was collected by another for the benefit of still other persons.

The Board of Tax Appeals and the Circuit Court of Appeals grounded their decisions upon the proposition

that the petitioner benefited from the creation of the trust by relieving himself of the burden of carrying life insurance for his dependents. But he did this by making a gift and parting with the beneficial ownership of the policies (permanently) and of the corpus of the trust fund (for the period of the trust). The fallacy of the argument made by the Government and accepted by the tribunals below—that relief from a moral obligation constitutes taxable income—can be readily seen by applying it to other situations. Suppose a taxpayer felt a moral obligation to provide for his daughter who was about to marry and, instead of giving her an allowance year after year, made her a present of a dowry, the income from which would be sufficient to take care of her. Could it be said that the income which she thereafter received was properly taxable to him because he was relieved of the moral obligation of continuing to support her? Would the situation be any different if he placed the dowry in the hands of a trust company to pay the income to his daughter for life (or for his own life) with a remainder over, retaining no rights in himself?

Hoeper v. *Tax Commission of Wisconsin*, 284 U. S. 206, was not decided upon the ground that the principal which yielded Mrs. Hoeper's income had never been the property of Mr. Hoeper, but upon the ground that it was not his property at the time it yielded the income which was the subject of the tax. Present ownership of the corpus (or a power of disposition thereof equivalent to ownership) may be a basis for the taxation of income, but past ownership of a corpus is no more a proper basis for taxation of income than it would be for the inclusion of the corpus in the taxable estate of a decedent. And, as Mr. Justice Roberts wrote in *Reinecke* v. *Smith, supra*:

"As pointed out in *Burnet* v. *Guggenheim*, No. 283, October Term, 1932, the same considerations as to ownership and control affect the power to impose a tax on the transfer of the corpus and upon the income."

(g) The principle of our graduated income taxes is to vary the burden according to the ability to pay. The tax proposed in this case is based on a theory that wholly disregards this principle. If the settlor should become insolvent, the income of the trust funds would go untaxed, according to the Government's theory for the statute certainly does not give the Government an election to go against the trustee if it fails to collect from the settlor.

However, if section 219(h) should be held unconstitutional an exception to the provisions of section 219(b) would disappear and (under section 219(b)) the income would be taxable to the trustee, by whom it is received and by whom the corpus of the trust is held.

POINT V.

The Fact that the Settlor Had a Reversion in the Corpus Does Not Render Him Taxable on the Income During the Prior Term.

The Board of Tax Appeals has recently had occasion to hold that the ownership of a reversionary interest is not the source of the income during the prior term and accordingly that income should be taxed to the holder of the present estate rather than to the holder of the future estate. *R. E. Nail, et al, Executors*, v. *Commissioner*, 27 B. T. A. 33.[1] The principle is the same in

[1] The Commissioner of Internal Revenue has published his acquiescence in this decision, XII, I. R. B., No. 9, p. 1, and the time for an appeal from the Board's decision has expired.

the case at bar. During the period of the trust the settlor could not subject either corpus or income to his own uses. The income was received by the trustee, the corpus was held by the trustee. The trustee was, for the term of the trust, unquestionably the owner of both corpus and income for the uses mentioned in the trust agreement.

As the Circuit Court of Appeals for the Fifth Circuit said in *United States* v. *Looney*, 29 Fed. (2d) 884, 885:

> "Rents or royalties are included in the income of their owner, though they are not actually received by him, but pursuant to his direction are paid to another. [citations] But rents or royalties are not properly included in the income of one who did not own, receive, or control them; the ownership thereof being vested in another when they accrued."

POINT VI.

The Extension of the Trust from December 18, 1926, Was Similar to the Creation of a New Trust.

Although a statement of the facts necessarily shows that the original trust was created before the enactment of section 219(h) of the Revenue Act of 1924, it is submitted that had the trust been created thereafter, section 219(h) could not be applied to the income thereunder without violating the Constitution. If a man makes an absolute gift of property, even today, it is submitted that the income of that property cannot be taxed to the donor while the property belongs to the donee. When Mr. du Pont extended the trust before it first expired on December 18, 1926, he in effect created a new trust in terms similar to the original trust and everything that has been urged in this brief would be applicable to it.

Section 219(h) can not be justified as a gift tax—it does not measure the tax by the value of the gift. *Heiner* v. *Donnan*, 285 U. S. 312.

The arbitrary nature of the tax and its capriciousness are demonstrated in the Revenue Act of 1932. That Act continues the tax imposed by section 219(h) of the Acts of 1924 and 1926 in the following language:

> "Sec. 167. Income for Benefit of Grantor.
> "(a) Where any part of the income of a trust—
> "(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or
> "(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or
> "(3) is * * * applied to the payment of premiums upon policies of insurance on the life of the grantor * * *;
> "then such part of the income of the trust shall be include in computing the net income of the grantor."

Section 501 of the Revenue Act of 1932 imposes a gift tax in the following language:

> "(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift.
> "(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *
> "(c) The tax shall not apply to a transfer of property in trust where the power to revest in the

donor title to such property is vested in the donor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such property or the income therefrom, but the relinquishment or termination of such power (other than by the donor's death) shall be considered to be a transfer by the donor by gift of the property subject to such power, and any payment of the income therefrom to a beneficiary other than the donor shall be considered to be a transfer by the donor of such income by gift."

Congress, by taxing as gifts the creation of irrevocable trusts (without any exception for trusts to pay insurance premiums), recognizes the completeness of the transfer. By excepting revocable trusts from the gift tax, it recognizes that incomplete transfers should not be taxed as gifts. In the case of revocable trusts it is consistent in taxing the income to the creator of the trusts until such time as he makes the gift complete and ceases to be the owner (actual or potential) of the source of the income.

But in the case of the trust to pay insurance premiums, Congress taxes the grantor on a transfer by gift and then continues to tax him on the income of that gift as if no transfer had been made. It is submitted that this is arbitrary and capricious and a denial of due process of law.

When an irrevocable trust is set up to pay insurance premiums on policies in which no interest is retained by the grantor, it is proper to tax the grantor upon the creation of such trusts if Congress desires to impose a gift tax. But it is improper to tax the income of that trust to the grantor for the reason that it is not his income. As was said by Mr. Justice Sutherland in *Heiner* v. *Donnan, supra*:

"Such an exaction is not taxation but spoliation."

CONCLUSION

It is respectfully submitted that section 219(h) of the Revenue Acts of 1924 and 1926 is unconstitutional as applied to the facts of this case.

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APPENDIX

Section 219 of the Revenue Act of 1924 and Section 219 of the Revenue Act of 1926 include the following:

"(a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

"(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

"(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

"(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

"(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

"(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—* * *

"(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

"(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust,

either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor."

Section 1103 of the Revenue Act of 1924 and Section 1213 of the Revenue Act of 1926 provide:

"If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."